JOHN R. LYNN
JOE TROW

IBLA 86-1446
IBLA 88-268 Decided January 6, 1989

Separate appeals from decisions of the Montana State Office, Bureau of Land Management, declaring various mining claims null and void ab initio. M MC 5535 to M MC 5538, M MC 8792 to M MC 8794, M MC 150274.

Reversed and remanded.

1. Mining Claims: Generally--Mining Claims: Location--Mining Claims: Withdrawn Land--Wild and Scenic Rivers Act

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. || 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

APPEARANCES: John R. Lynn, pro se; Joe Trow, pro se; Richard K. Aldrich, Esq., Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

John R. Lynn has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated May 28, 1986, declaring seven mining claims null and void ab initio. 1/ Joe Trow has appealed from a decision dated February 5, 1988, from the same State office, declaring the

1/ The claims declared void in the May 28, 1986, decision were held jointly by Lynn and Charles M. Hauptman. Both Lynn and Hauptman filed notices of appeal, but, in an order dated Nov. 5, 1986, the Board found that the notice of appeal filed by Hauptman was untimely; his appeal was therefore dismissed. Counsel for BLM subsequently asked the Board to reconsider its order to the extent that it found that Lynn had timely filed a notice of appeal. That request is hereby denied.

Spitoon #3 mining claim null and void ab initio. Because of a uniformity of issues presented for review, these appeals have been consolidated for adjudication. 2/

The record reflects that Lynn located two of the claims found void on June 24, 1977, two on June 28, 1977, and three on November 11, 1977. All the claims are situated within secs. 31, 32, or 33 of T. 24 N., R. 21 E., Principal Meridian. These claims were duly recorded with BLM pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1744(b) (1982). In its decision, BLM found each of the seven claims null and void ab initio, in its entirety, "because the claims are located on lands not open to mineral location. These seven mining claims all lie within the management boundary of the Upper Missouri Wild and Scenic river corridor which has been withdrawn from all forms of appropriation under the mining laws."

Trow located the Spitoon #3 claim on January 7, 1988, and recorded the claim with BLM on February 3, 1988. This claim is situated in sec. 9, T. 23 N., R. 20 E., Principal Meridian. In its February 5, 1988, decision, BLM found:

> The Spitoon #3 mining claim is declared null and void, ab initio, in its entirety, because the claim is located on lands not open to mineral entry. [The claim] is located on lands which lie within the management boundary of the Upper Missouri Wild and Scenic River corridor. This corridor has been withdrawn from all forms of appropriation under the mining laws.

As noted in both BLM decisions on appeal, BLM declared the claims null and void because they had been located on "lands which lie within the management boundary" of the designated river, which, according to BLM, are "not open to mineral entry." BLM's position, as stated in the decision finding Trow's claims null and void, is that any lands within the management boundaries or "corridor" are "withdrawn from all forms of appropriation under the mining laws."

The Wild and Scenic Rivers Act was adopted on October 2, 1968. As originally adopted, section 3(a) of the Act, 82 Stat. 907, 16 U.S.C. | 1274(a) (1970), designated only eight rivers and the land adjacent thereto as components of the national wild and scenic river system. No portion of the Missouri River was at that time included within the wild and scenic river system. However, the portion of the Missouri River presently at issue was identified for further study to determine its potential for inclusion in the wild and scenic rivers system by section 5(a)(13) of the 1968 Act, 82 Stat. 910, 16 U.S.C. | 1276(a)(13) (1970).

2/ The Lynn appeal is docketed with the Board at IBLA 86-1446; the Trow appeal is docketed at IBLA 88-268.

Subsequently, in the Act of October 12, 1976, 90 Stat. 2327, section 3(a) of the Wild and Scenic Rivers Act was amended, inter alia, to include within the wild and scenic system:

> (14) Missouri, Montana. -- The segment from Fort Benton one hundred and forty-nine miles downstream to Robinson Bridge, as generally depicted on the boundary map entitled "Missouri Breaks Freeflowing River Proposal", dated October 1975, to be administered by the Secretary of the Interior.

The 1976 Act further provided as follows:

> Sec. 202. After consultation with the State and local governments and the interested public, the Secretary shall, pursuant to section 3(b) of the Wild and Scenic Rivers Act and within one year of enactment of this Act--
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> (1) establish detailed boundaries of the river segment designated as a component of the National Wild and Scenic Rivers System * * *.
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> (2) determine, in accordance with the guidelines in section 2(b) of the Wild and Scenic Rivers Act, which of the three classes--wild river, scenic river, or recreation river--best fit portions of the river segment, designate such portions in such classes, and prepare a management plan for the river area in accordance with such designation.
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> Sec. 203. (a) The Secretary of the Interior * * * shall manage the river area pursuant to the provisions of this Act and the Wild and Scenic Rivers Act, and in accordance with the provisions of the Taylor Grazing Act * * * under principles of multiple use and sustained yield, and with any other authorities available to him for the management and conservation of natural resources and the protection and enhancement of the environment, where such Act, principles, and authorities are consistent with the purposes and provisions of this Act and the Wild and Scenic Rivers Act.
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> (b)(1) The Secretary may acquire land and interests in land only in accordance with the provisions of this Act and the Wild and Scenic Rivers Act and the limitations contained in section
> of that Act and only: * * * (D) in that portion of the river area downstream from Coal Banks Landing so as to provide, wherever practicable and necessary for the purposes of this Act and the Wild and Scenic Rivers Act, rim-to-rim protection for such portion.

Both appellants object to BLM's conclusion that the lands on which their claims are located have been withdrawn from entry under the mining laws. While they admit that section 9 of the Wild and Scenic Rivers Act, 16 U.S.C. | 1280 (1982), expressly withdraws all Federal land within one-quarter mile of any river designated as a "wild river" within the wild and

scenic river system from entry under the mining laws, they point out that their claims are generally outside of the one-quarter mile corridor. They argue that nothing in either the Wild and Scenic Rivers Act or the Act of October 12, 1976, withdrew all of the lands within the management boundaries from mineral entry. Therefore, appellants contend, the lands on which they located their claims remained open to entry under the mining laws of the United States. Thus, the issue on appeal is whether BLM correctly concluded that all lands within the management boundaries of the Upper Missouri Wild and Scenic River are withdrawn from mineral entry.

Before analyzing that question, we will first review certain statutory provisions that generally govern the establishment of boundaries for components of the wild and scenic rivers system and which determine the applicability of the mining laws thereon.

Section 3(b) of the Wild and Scenic Rivers Act, 16 U.S.C. | 1274(b) (1982), referred to in section 202 of the Act of October 12, 1976, makes specific provisions for the establishment of management boundaries once a river has been designated as part of the wild and scenic rivers system:

> The agency charged with the administration of each [designated] component of the national wild and scenic rivers system * * * shall * * * establish detailed boundaries therefor (which boundaries shall include an average of not more than three hundred and twenty acres per mile on both sides of the river); determine which of the classes [wild, scenic or recreational] best fit the river or its various segments; and prepare a plan for necessary developments in connection with its administration in accordance with such classification. Said boundaries, classification, and development plans shall be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and the Speaker of the House of Representatives.

In 1978, in accordance with section 202 of the Act of October 12, 1976, and section 3(b) of the Wild and Scenic Rivers Act, BLM established the management boundaries for the portion of the Missouri River designated a component of the wild and scenic rivers system. See Upper Missouri Wild and Scenic River Final Management Plan (Management Plan). The relevant segment of the river was denominated as the Magdall Homestead to Cow Island segment and was designated as "wild." See Management Plan at 68-70. It was also noted that "[b]eginning October 12, 1976, no new mining claims may be located within the exterior boundaries of the management corridor until regulations are issued by the Secretary of the Interior" (Management Plan at 45).

An earlier conceptual plan had been completed the previous year. In this document, BLM had also noted, in reference to this segment and other segments classified as "wild," that "[s]ubject to valid existing rights, all federal lands are withdrawn from mineral entry within the defined boundary." See 1977 Conceptual Plan at 29, 32. Neither document, however, explained the specific basis for this conclusion.

In the decisions appealed from, BLM found that all Federal lands within these established boundaries had been withdrawn from mineral entry. While BLM again did not explain the basis for its conclusion that the lands were withdrawn, both decisions referenced two documents which directly address this issue. The first was a memorandum from the Field Solicitor, Billings, to the Montana State Director, dated January 6, 1977. The second was a memorandum from the Chief, Branch of Lands and Minerals Operations, Montana State Office, to the Lewistown District Manager, dated February 25, 1977. We have carefully considered these two memoranda, in light of both the 1968 Wild and Scenic Rivers Act and the 1976 amendments thereto. We have concluded, however, that these documents err in finding that all lands within the management boundaries of the Upper Missouri Wild and Scenic River are automatically withdrawn from the operation of the mining laws.

Section 9 of the Wild and Scenic Rivers Act, 16 U.S.C. | 1280 (1982), makes specific provision for the applicability of the Federal mining laws to designated components of the wild and scenic rivers system. Because this section is central to the issues raised in this case, it is set forth below:

> [(a)] Nothing in this chapter shall affect the applicability of the United States mining and mineral leasing laws within components of the national wild and scenic rivers system except that--
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> (i) all prospecting, mining operations, and other activities on mining claims which, in the case of a component of the system designated in [16 U.S.C. | 1274], have not heretofore been perfected or which, in the case of a component hereafter designated pursuant to this chapter or any other Act of Congress, are not perfected before its inclusion in the system and all mining operations and other activities under a mineral lease, license, or permit issued or renewed after inclusion of a component in the system shall be subject to such regulations as the Secretary of the Interior * * * may prescribe to effectuate the purposes of this chapter;
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> (ii) subject to valid existing rights, the perfection of, or issuance of a patent to, any mining claim affecting lands within the system shall confer or convey a right or title only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed by the Secretary of the Interior * * *; and
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> (iii) subject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the
> bed or bank or are situated within one-quarter mile of the bank
> of any river designated a wild river under this chapter or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto.

> Regulations issued pursuant to paragraphs (i) and (ii) of this subsection shall, among other things, provide safeguards against pollution of the river involved and unnecessary impair-
> ment of the scenery within the component in question.

[1] Pursuant to section 9(a)(iii), all lands "within one-quarter mile" of the bank of the Upper Missouri River segment in question were automatically withdrawn from all forms of appropriation under the mining laws upon enactment of the Act of October 12, 1976. However, it does not follow, as BLM has concluded, that all lands within the management boundaries for the designated river are likewise withdrawn from mineral entry. While clearly BLM was authorized to determine those boundaries, the mere fact that a specific parcel of land was included within those boundaries did not effect a withdrawal of the minerals located therein. To the contrary, section 9 explicitly declares that, other than the exceptions for which it provides, "[n]othing in this chapter shall affect the applicability of the United States mining * * * laws within components of the national wild and scenic rivers system * * *."

Section 9(a)(i) provides that mining claims perfected after the land on which they are located is included in the system "shall be subject to such regulations as the Secretary of the Interior * * * may prescribe"
to effectuate the purposes of the Wild and Scenic Rivers Act. Since an "unperfected" claim is, by definition, one in which the claimant has no indefeasible right as against the United States, this provision necessar-
ily contemplates that certain lands within components of the system would remain subject to the mining laws, though potentially subject to more stringent regulation in light of the purposes of the Act. Accord Clarence E. Fitzgerald, 55 IBLA 31 (1981). Thus, generally, under section 9(a)(i), lands situated "within components of the * * * system," but outside the one-quarter mile statutory withdrawal, remain subject to the mining laws absent an affirmative act withdrawing those lands. To find otherwise would render the provisions in section 9(a)(i), 16 U.S.C. | 1280(a)(i) (1982), a nullity.

Likewise, nothing can be read into BLM's authority to fix the management boundaries of this component under section 3(b) of the Wild and Scenic Rivers Act, 16 U.S.C. | 1274(b) (1982), as an inherent or automatic withdrawal of those lands that are placed within such boundaries. The Wild and Scenic Rivers Act is clear in stating that nothing in the Act, beyond those specific limitations already discussed, "shall affect the applicability" of the mining laws to the lands in the system. Thus, we are unable to find anything in the Wild and Scenic Rivers Act which supports the assertion that all lands within the boundaries of a wild and scenic river are, by the mere fact that they are within such boundaries, automatically withdrawn from the operation of the mining law.

It remains, however, to determine whether any statutory provision specific to the Upper Missouri River Wild and Scenic River compels a differing conclusion. It is clear that no provision of the Act of October 12, 1976, expressly purports to close all of the land determined to be within

the management boundaries to mineral location. 3/ We note, however, that in determining the management boundaries for this portion of the Missouri river BLM interpreted section 203(b)(1) of the Act of October 12, 1976, as requiring, for certain segments of the river, "rim-to-rim" protection of the lands along those segments.

Section 203(b)(1) provides:

> The Secretary may acquire land and interests in land only in accordance with the provisions of this Act * * * and only * * * in that portion of the river area downstream from Coal Banks Landing [which includes the segment in question in this appeal] so as to provide, wherever practical and necessary for the purposes of this Act and the Wild and Scenic Rivers Act, rim-to-rim protection for such portion.

Clearly, regardless of whatever authority this section may provide for BLM to withdraw such lands from the operation of the mining laws, nothing in the language of this section could possibly be read as automatically effecting such a withdrawal.

Moreover, a review of the legislative history of the Act of October 12, 1976, undercuts any assertion that Congress intended that all land within the management boundaries be withdrawn from mineral location. Thus, S. Rep. No. 94-502, 94th Cong., 1st Sess., discussed the effect which the provisions of the Act would have on lands included within the Upper Missouri Wild and Scenic River. Thus, the report noted:

> Because the word "wild" is a part of the Wild and Scenic Rivers Act, many assume that the wild and scenic river areas are treated like wilderness areas. It is erroneous, however, to make an analogy between the Wild and Scenic Rivers Act and the Wilderness Act. The Wild and Scenic Rivers Act should more properly be considered a multiple-use act, save one use. The only use prohibited is impoundment; the river segment must remain free flowing.
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> All of the uses presently being made of the Missouri Breaks would continue without significant interference upon designation

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3/ BLM seems to base its contrary conclusion on the fact that, when establishing the Upper Missouri Wild and Scenic River, Congress described the lands as those lands "as generally depicted on the boundary map entitled 'Missouri Breaks Freeflowing River Proposal,' dated October 1975." Section 201 of the Act of Oct. 12, 1976, 16 U.S.C. | 1274(14) (1982). See Jan. 6, 1977, memorandum from the Field Solicitor, Billings, to the Montana State Director. However, the language used by Congress merely describes the portion of the river made a part of the wild and scenic rivers system; it in no way indicates an intention to withdraw from the operation of the mining laws all of the lands depicted within the boundaries set forth on the referenced map.

> of the river as a wild and scenic river. Farming, grazing, residential use, hunting and fishing, ferry and bridge travel would be unaffected by the Wild and Scenic Rivers Act and S. 1506, as ordered reported. The Wild and Scenic Rivers Act and S. 1506 would not interfere with the operation of the mining and mineral leasing laws, except where portions of the river segment are designated as "wild." In the wild portions, mineral development may be limited within a quarter mile from the bank of the river. The Wild and Scenic Rivers Act provides that claims perfected and leases let in a river corridor after its inclusion in the National Wild and Scenic Rivers System may be operated subject to regulations designed to protect the natural values of the river. Prior claims and leases are not subject to such regulation. [Emphasis supplied.]

S. Rep. No. 94-502 at 9. The thrust of the foregoing seems clearly to support the interpretation that, except for land within one-quarter mile of a "wild" river, all lands within the management corridor would remain open to location but subject to such regulations as the Secretary might establish.

One other section of the 1976 Act is relevant. Section 203(g)(1)(B) provides that: "The Secretary, acting through the Bureau of Land Management, shall exercise management responsibilities in the river area for: * * * (B) the application of the United States mining and mineral leasing laws." A review of the February 25, 1977, memorandum from the Chief, Branch of Lands and Minerals Operations, to the Lewistown District Manager, indicates that, based on this language, BLM concluded that, until such time as regulations were issued authorizing the location of minerals, the lands within the management boundaries were not open to mineral entry. Thus, the memorandum noted that, after adoption of the Act of October 12, 1976, "No new mining claims can be located within the exterior boundaries until regulations are issued by the Secretary." Id. at 2; accord Management Plan at 45. To the extent that this assertion is premised on the language of section 203(g)(1)(B) of the 1976 Act, set forth above, we do not think that it is a sustainable interpretation of that statutory language.

While section 203(g)(1)(B) grants BLM the authority to manage the application of the mining and mineral leasing laws of the United States in all lands within the management boundaries of the Upper Missouri Wild and Scenic River, nothing in the language of the Act suggests that, in the absence of regulations controlling the location and use of mining claims, all lands within the management boundaries are withdrawn from entry. In this regard, we think it is useful to compare the language of section 2 of the Recreation and Public Purposes (R&PP) Act, as amended, 43 U.S.C. | 869-1 (1982), which has been interpreted as precluding the location of mining claims on patented or leased lands until such time as the Secretary affirmatively adopted regulations.

In relevant part, section 2 of the R&PP Act provides that "[e]ach patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right

to mine and remove the same, under applicable laws and regulations to be established by the Secretary." (Emphasis supplied.) In interpreting the underscored language, the Department has consistently held that, until
such time as the Secretary issues regulations providing for the location
of mining claims on lands patented or leased pursuant to the R&PP Act,
the lands patented or leased are not subject to the location of mining claims. See George Schultz, 81 IBLA 29, 37 (1984); The Dredge Corp., 64 I.D. 368, 374 (1957), aff'd, Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966). However, the difference between this language and that used in section 203(g)(1)(B) of the 1976 Act is striking.

Section 2 of the R&PP Act clearly makes the right to mine and remove the reserved mineral deposits dependent upon regulations "to be established by the Secretary." If no regulations are promulgated, no rights to the reserved mineral deposit may be acquired. Section 203(g)(1)(B), on the other hand, merely provides that BLM has management responsibilities in the river area with respect to the application of the United States mining and mineral leasing laws. Clearly, BLM could, pursuant to this statutory authority, withdraw all land within the management boundaries of the wild and scenic river. But, unlike section 2 of the R&PP Act where a withdrawal of land may be effectively accomplished simply by failing to take action, section 203(g)(1)(B) requires an affirmative act on the part of BLM to bar mineral location on any land within the management boundaries of the Upper Missouri Wild and Scenic River but outside of the one-quarter mile statutory withdrawal.

Thus, we must conclude that nothing in either the Wild and Scenic Rivers Act, or the Act of October 12, 1976, constitutes an automatic withdrawal of lands within the management area of a wild and scenic river which are situated beyond the one-quarter mile statutory withdrawal otherwise provided. Nor has BLM pointed to any affirmative action on its part which could fairly be said to effectuate such a withdrawal. 4/ Therefore, to the extent that the decision below was premised on a perception that all land within the management area of the Upper Missouri Wild and Scenic River was withdrawn, it must be reversed.

Appellants in their statements of reasons have strongly asserted that their mining claims, with the exception of part of the Hal #29, are clearly beyond the one-quarter mile withdrawal. We note, however, that the basis for BLM's decision was not that the claims fell within the one-quarter mile statutory withdrawal, but rather that they were located within the management boundaries. Accordingly, no determination has been made whether these claims are within one-quarter mile of the river. Cf. Barry C. Binning, 39 IBLA 390 (1979).

4/ Nothing in the notice published in the Federal Register on Jan. 22, 1980, as provided by section 3(b) of the Wild and Scenic Rivers Act, as amended, 16 U.S.C. | 1274(b) (1982), purported to withdraw all land within the management boundaries of wild segments of the Upper Missouri Wild and Scenic River. See 45 FR 4474 (Jan. 22, 1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the case files are remanded for further action as appropriate.

James L. Burski
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member